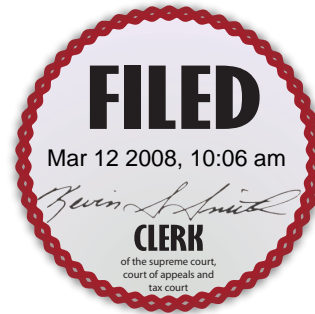


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

MARLON PORTER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0707-CR-579

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jose Salinas, Judge
Cause No. 49G17-0703-CM-35418

March 12, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Marlon Porter was convicted after a bench trial of invasion of privacy, a Class A misdemeanor.¹ Porter appeals the trial court's decision to allow the State to amend the information after the State presented its case. We affirm.

FACTS AND PROCEDURAL HISTORY

On March 1, 2007, Indianapolis Metropolitan Police Officer Jack Rebolledo observed a vehicle parked in a fire lane at the Linwood Square Mall. A passenger and a child were in the vehicle, but there was no driver. Officer Rebolledo determined the license plate number had not been on file since 2005 and initiated a traffic stop.

Porter emerged from a check cashing business and approached the vehicle. Officer Rebolledo learned a protective order had been issued against Porter at the request of Alice Sanders, who was the passenger in the vehicle. He arrested Porter. On the way to the jail, Porter volunteered he had been released on bond the day before for a battery charge against Sanders. The judge had told him to stay away from her, but Porter did not think it was required. Two no contact orders had been issued to protect Sanders from Porter. One was a "pre-trial no contact order" and the other was a "no contact order upon release from custody on bail or personal recognizance." (State's Ex. 1 and 2.)

The State charged Porter with Class A misdemeanor invasion of privacy. The charging information stated Porter violated a "protective order." (Appellant's App. at 14.) Porter had in fact been issued two no contact orders. After each party rested, Porter moved for a directed verdict on the basis that the State had not shown a protective order

¹ Ind. Code § 35-46-1-15.1

had been issued as provided in the charging information. The State moved to amend the information to show there was a no contact order issued rather than a protective order. The trial court granted the amendment and found Porter guilty of invasion of privacy.

DISCUSSION AND DECISION

Where, as here, a defendant is charged with only a misdemeanor, Indiana Code § 35-34-1-5(b) allows the State to amend matters of substance in the charging information up to fifteen days before the omnibus date if the amendment does not prejudice the defendant's substantial rights.² Indiana Code § 35-34-1-5(c) allows the court, on motion of the prosecuting attorney, to amend the charging information "at any time before, during, or after the trial" with regard "to any defect, imperfection, or omission in form which does not prejudice the substantial rights of the defendant." Porter argues the amendment was a matter of substance and allowing the amendment would prejudice his substantial rights.

[A]n amendment is one of form, not substance, if both (a) a defense under the original information would be equally available after the amendment, and (b) the accused's evidence would apply equally to the information in either form. And an amendment is one of substance only if it is essential to making a valid charge of the crime.

Fajardo v. State, 859 N.E.2d 1201, 1207 (Ind. 2007).³ The trial court correctly determined the amendment to the charging information was one of form.

² The General Assembly has since amended Indiana Code § 35-34-1-5(b) so that a charging information may be amended at any time prior to trial as to either form *or* substance, so long as such amendment does not prejudice the substantial rights of the defendant. *See* P.L. 178-2007 § 1.

³ In response to *Fajardo*, the General Assembly amended Indiana Code § 35-34-1-5(b) as stated in footnote 2. While the statutory changes supercede portions of *Fajardo*, the portion herein cited is still an accurate statement of the law. *See Jewell v. State*, 877 N.E.2d 864, 876 (Ind. Ct. App. 2007).

The amendment changed a one-count information charging a violation of a protective order to a one-count information charging a violation of a no contact order. Both charges are Class A misdemeanor invasion of privacy under Indiana Code § 35-46-1-15.1. Both offenses include the same elements: knowingly or intentionally violating an order of protection. The date, the location of the offense, and the specific conduct alleged were not changed, nor did the amendment cause Porter to lose any potential defenses or affect the application of his evidence to the crimes charged. *See Jones v. State*, 863 N.E.2d 333, 337-38 (Ind. Ct. App. 2007) (amendment to reflect possession of heroin and not cocaine as initially charged was one of form, not substance). *Cf. Fajardo*, 859 N.E.2d at 1207-08 (amendment included a new and separate offense from the original charge and the evidence was not equally applicable to the alleged additional charge). The amendment to Porter’s information was one of form, not one of substance.

The amendment did not prejudice Porter’s substantial rights.⁴ “These substantial rights include a right to sufficient notice and an opportunity to be heard regarding the charge; and, if the amendment does not affect any particular defense or change the positions of either of the parties, it does not violate these rights.” *Jones*, 863 N.E.2d at 338. Whether the defendant had a reasonable opportunity to prepare for and defend against the charges is the ultimate question. *Id.* at 339.

Porter has not demonstrated prejudice to his substantial rights from the State’s amendment. Porter still faced the charge of Class A misdemeanor invasion of privacy.

⁴ Ind. Code § 35-34-1-5(c).

Moreover, the evidence Porter violated a protective order would necessarily have been the same as the evidence he violated a no contact order, the only difference being the nature of the order of protection. Porter knew the invasion of privacy charges against him stemmed from the no contact orders issued against him. Porter signed both no contact orders, and he was provided with the probable cause affidavit stating the protective orders at issue stemmed from the battery charges pending against him.

Whether the charging information called the orders “protective” or “no contact” was immaterial as each violation would be proven by the same elements: knowingly or intentionally violating an order of protection. As such, the amendment does not “affect any particular defense or change the positions of either of the parties.” *Id.* Porter had reasonable opportunity to prepare for and defend against the charge against him. Accordingly, the trial court did not err when it allowed the State to amend the information after trial.

Affirmed.

RILEY, J., and KIRSCH, J., concur.